Case C-240/23

Request for a preliminary ruling

Date lodged:

17 April 2023

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

9 December 2022

Appellant on a point of law:

Herbaria Kräuterparadies GmbH

Respondent on a point of law:

Freistaat Bayern

Copy

Bundesverwaltungsgericht

(Federal Administrative Court)

ORDER

[…]

In the administrative-law case

Herbaria Kräuterparadies GmbH,
[…] Fischbachau,

applicant, appellant and
appellant on a point of law,

[…]

v

Freistaat Bayern,
represented by the Public Prosecutor's Office for the *Land* of Bavaria,
[…] Munich,

defendant, respondent and
respondent on a point of law,

the 3rd Chamber of the Bundesverwaltungsgericht (Federal Administrative Court),
at the hearing on 9 December 2022
[…],

made the following order:

The proceedings are stayed.

The following questions on the interpretation of Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ [2018] L 150, p. 1), as currently amended by Commission Delegated Regulation (EU) 2022/474 of 17 January 2022 (OJ [2022] L 98, p. 1) and the Charter of Fundamental Rights of the European Union, are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

1. Is Article 33(1) of Regulation (EU) 2018/848 to be interpreted as meaning that the organic production logo of the European Union may be used for a processed foodstuff which is imported for the purpose of placing it on the market within the Union as an organic product, under the conditions laid down in Article 45(1) of Regulation (EU) 2018/848, but, because it contains, in addition to plant products, minerals and vitamins of non-plant origin, does not meet the requirements of Article 16(1) of Regulation (EU) 2018/848 in conjunction with Annex II, Part IV, point 2.2.2(f) thereto?

2. If Question 1 is to be answered in the affirmative, does it follow from Article 20 of the Charter of Fundamental Rights of the European Union that the organic production logo of the European Union may be used for a processed foodstuff if it originates from the European Union and complies with the equivalent production and control provisions of a third country recognised in accordance with Article 48(1) of

Regulation (EU) 2018/848, but does not meet the requirements of Article 16(1) of Regulation (EU) 2018/848 in conjunction with Annex II, Part IV, point 2.2.2(f) thereto?

3. Does it follow from Article 20 of the Charter of Fundamental Rights of the European Union that such a processed product originating from the European Union may bear terms referring to organic production, in accordance with Article 30(1) of Regulation (EU) 2018/848, without using the organic production logo of the European Union?

G r o u n d s:

I

1 This dispute concerns the labelling of a processed foodstuff as being organically produced.

2 The applicant manufactures the product ‘Blutquick’, a fruit mixture of organically produced fruit juices and herbal extracts. Non-plant vitamins and iron gluconate are added to the drink. The applicant markets ‘Blutquick’ as a food supplement. The packaging carries the organic production logo of the European Union (EU organic production logo), the national organic production seal and a reference to ingredients as originating from ‘controlled organic cultivation’.

3 By decision of 18 January 2012, the Bavarian Regional Office for Agriculture ordered, inter alia, that the applicant remove from the labelling, advertising and marketing of the aforementioned product the reference to organic farming, which is protected in accordance with Article 23 of Council Regulation (EC) No 834/2007 on organic production and repealing Regulation (EEC) No 2092/91 (OJ [1991] L 189, p. 1), by 1 December 2012. By way of grounds for that order, it stated that, in accordance with the provisions of Regulation (EC) No 834/2007 and Article 27(1)(f) of Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (OJ [2008] L 250, p. 1), vitamins and minerals may be added to processed products bearing the description ‘organic’ only if their use is legally required. That is not the case with ‘Blutquick’.

4 The applicant brought an action against that decision. The Verwaltungsgericht (Administrative Court) referred questions concerning the interpretation of Article 27(1)(f) of Regulation (EC) No 889/2008 to the European Court of Justice. By judgment of 5 November 2014 (C-137/13), the European Court of Justice held that Article 27(1)(f) of Regulation (EC) No 889/2008 is to be interpreted as meaning that the use of one of the substances referred to in that provision is legally required only when a provision of EU law or a provision of national law compatible therewith directly requires that that substance be added to a foodstuff in order for that foodstuff to be placed on the market at all. The use of such a substance is not legally required within the meaning of that provision where a

foodstuff is marketed as a food supplement, with a nutrition or health claim or as a foodstuff for a particular nutritional use, [even] though this implies that, in order to comply with the relevant provisions of EU law governing the incorporation of substances into foodstuffs, that foodstuff must contain a determined quantity of the substance in question. The European Court of Justice did not comment on the objection which the applicant had raised even in the proceedings at that time, that it is discriminated against by comparison with undertakings from third countries which operate production systems recognised as equivalent, because the referring administrative court had not referred any questions in that regard.

5 The Verwaltungsgericht (Administrative Court) dismissed as unfounded the action challenging the aforementioned administrative decision. The applicant's appeal was also unsuccessful. By judgment of 29 July 2021 on the lawfulness of the contested decision, the appeal court held that, since the addition of vitamins and iron gluconate to a processed foodstuff such as 'Blutquick' is not expressly required by law, the applicant's use of the EU organic production logo is contrary to the labelling provision contained in Article 23 of Regulation (EC) No 834/2007. Article 27(1)(f) of Regulation (EC) No 889/2008 is not to be interpreted extensively even in the light of Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'). The applicant considers itself to be afforded unequal treatment by Article 33(1) of Regulation (EC) No 834/2007 because that provision allows competing products from the USA to be placed on the market in the European Union as organic products carrying the EU organic production logo, even though they have had added to them substances, in particular vitamins, which, in accordance with Article 23(1) of Regulation (EC) No 834/2007 and Article 27(1) of, and Annex VIII to, Regulation (EC) No 889/2009, are not allowed when such products are manufactured in the European Union. No such unequal treatment is present, however. It is true that similar organic products from the USA may be marketed in the European Union as organic products. However, they may not carry the EU organic production logo. In accordance with Article 25(1) of Regulation (EC) No 834/2007, the EU organic production logo may be used so long as the products comply with the provisions of Regulation (EC) No 834/2007. This is not necessarily true of equivalent products, which, for the purposes of Article 25(1) of Regulation (EU) 834/2007, are compatible with that regulation only if they comply with all of its provisions without exception. This is not true of a USA-manufactured product equivalent to the applicant's.

6 By its appeal on a point of law, the applicant continues to challenge the decision of 18 January 2012 and submits in essence that a product imported as equivalent may bear the EU organic production logo even if it does not at the same time comply with the production provisions contained in Regulation (EC) No 834/2007. If its product 'Blutquick' is prohibited from benefiting from the same treatment, there is an infringement of the principle of equivalence laid down in Article 20 of the Charter. What is more, such an infringement is present not least because US products with added vitamins and minerals are allowed to be presented as organic products (whether or not they use the EU organic production

logo), whereas the applicant itself is allowed to market ‘Blutquick’ only as a conventional product. The ban on adding vitamins and mineral compounds to its product cannot legitimately apply to it if it does not apply to producers in the USA.

7 The defendant contests the appeal on a point of law and submits in essence that a product originating from a recognised third country may carry the EU organic production logo only if it complies with the provisions of Regulation (EC) No 834/2007. The alleged unequal treatment is not present. Through the mutual recognition of equivalence, access to the EU market has been granted even to products which do not comply with the provisions of EU law on organic production. The treatment equal to that afforded to US products which the applicant seeks would have the effect of changing the European Union system [of organic production and labelling of organic products] in a way which is specifically not envisaged by the recognition of equivalence, and would jeopardise the objectives of the EU texts in this field.

II

8 The proceedings must be stayed and a request made to the Court of Justice of the European Union for a preliminary ruling under Article 267(3) of the Treaty on the Functioning of the European Union. The interpretation of the EU law relevant to the decision to be given in the present dispute is not so obvious as to leave no scope for any reasonable doubt (see ECJ, Grand Chamber, judgment of 6 October 2021 – C-561/19 [ECLI:EU:C:2021:799], *Consorzio* – paragraph 39).

9 1. By the decision of 18 January 2012, the applicant was prohibited from using a reference to organic farming, as protected by EU law, for its ‘Blutquick’ product. That prohibition covers use of the EU organic production logo and of the German organic seal, as well as any other references to organic production, such as in the list of ingredients. The legal assessment of that order, given the character of the latter as an administrative act having permanent effect, must be based on the legal situation applicable at the time of the decision of the court hearing the appeal on a point of law (see in this regard BVerwG (Federal Administrative Court), judgment of 13 June 2019 – 3 C 28.16 – BVerwGE (Reports of the Federal Administrative Court) 166, 32, paragraph 11). This means that reliance is no longer to be placed on Regulation (EC) No 834/2007, on which the defendant appears to have based its order, but on Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ [2007] L150, p. 1).

10 2. The legal basis for the prohibition imposed on the applicant is Article 42(1) of Regulation (EU) 2018/848. This states that, in the event of non-compliance affecting the integrity of organic or in-conversion products throughout any of the stages of production, preparation and distribution, for example as a result of the use of non-authorised products, substances or techniques, or commingling with non-organic products, competent authorities are to ensure that no reference is

made to organic production in the labelling and advertising of the entire lot or production run concerned. The non-compliance, within the meaning of Article 3, point 57, of Regulation (EU) 2018/848, which, according to Article 42(1) thereof, is a condition of intervention, arises, in the case of 'Blutquick', as a processed product, from Article 16(1) of Regulation (EU) 2018/848 in conjunction with Annex II, Part IV, point 2.2.2(f) thereto. According to those provisions, minerals (including trace elements), vitamins, amino acids and micronutrients may be used in food processing provided that their use in food for normal consumption is 'directly legally required' in the meaning of being directly required by provisions of Union law or provisions of national law compatible with Union law, with the consequence that the food cannot be placed at all on the market as food for normal consumption if those minerals, vitamins, amino acids or micronutrients are not added. This, as even the applicant does not dispute, is not true of 'Blutquick'. Thus, the addition of vitamins and iron gluconate to the applicant's product is not covered by the wording of Annex II, Part IV, point 2.2.2(f), to Regulation (EU) 2018/848. Consequently, use of the EU organic production logo as provided for in Article 33(1) of Regulation (EU) 2018/848 is excluded; the same is true of the German organic seal, referred to in Article 33(5) of Regulation (EU) 2018/848. Neither can the labelling of 'Blutquick' include the terms 'organic' or 'ecological' referred to in Article 30(1) of Regulation (EU) 2018/848. On an unrestricted application of the aforementioned provisions, the prohibition of 18 January 2012 would be lawful, and the action and appeal on a point would be unsuccessful.

11 3. The applicant raises the objection in this connection that it follows from the principle of equivalence provided for in Article 20 of the Charter that it must be authorised to feature the EU organic production logo and a reference to organic production on the labelling of 'Blutquick', since a corresponding product manufactured in the USA is allowed to be marketed as 'organic' there and may therefore, on the basis of the equivalence arrangement between the European Union and the USA, be marketed as an organic foodstuff – and carry the EU organic production logo – in the EU. This Chamber is unable to decide whether or not to uphold that argument raised on appeal on a point of law without referring the matter to the European Court of Justice. This case calls for the clarification of several questions concerning the interpretation of EU law.

12 a) In this regard, this Chamber proceeds on the premiss that the Charter of Fundamental Rights of the European Union is applicable, in accordance with the first sentence of Article 51(1) thereof, because the provisions of Regulation (EU) 2018/848 concern the implementation of Union law.

13 b) Article 20 of the Charter requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (settled case-law, ECJ, judgment of 3 February 2021 – C-555/19 [ECLI:EU:C:2021:89] – paragraph 95).

14 aa) As regards the presence or otherwise of unequal treatment, it must first be clarified whether the applicant is right to say that, in relation to the use of the EU

organic production logo, its ‘Blutquick’ product is treated differently from a corresponding product of un undertaking from a third country such as the USA, when that product is imported into the European Union in order to be marketed as an organic product, in accordance with Article 45(1) of Regulation (EU) 2018/848. As explained in paragraph 2, because of the addition of vitamins and iron gluconate, ‘Blutquick’ may not be placed on the market using the EU organic production logo referred to in Article 33(1) of Regulation (EU) 2018/848. Accordingly, unequal treatment would be present if a processed foodstuff corresponding to that product and originating from a third country in which the addition of similar vitamins and minerals is allowed by provisions on production recognised as equivalent could carry the EU organic production logo when placed on the market within the European Union, even though that product does not comply with the provisions on production contained in Regulation (EU) 2018/848 because of the addition of those vitamins and minerals.

15 This Chamber is satisfied that the question as to whether such a product imported from a third country would be permitted to carry the EU organic production logo cannot be answered by reference to the rules contained in Article 33(1) of Regulation (EU) 2018/848 or to the previous case-law of the Court of Justice of the European Union – including Case C-137/13. The appeal court, adjudicating when Regulation (EU) 834/2007 was still applicable, answered that question in the negative and noted in essence in this regard that, in accordance with Article 25(1) of Regulation (EC) No 834/2007, the EU organic production logo may be used provided that the products comply with the provisions of that regulation. In so saying, Regulation (EU) draws a distinction between products which comply with the provisions of that regulation and those which are merely equivalent. The latter do not meet the conditions laid down in Article 25(1) of Regulation (EU) No 834/2007. That line of argument, which can in principle be transposed to the legal position applicable now, too, is not, however, so compelling that the outcome of an interpretation can be regarded as being beyond any doubt. This is true even to the extent that the appeal court invokes the scheme of that provision and the objective of consumer protection. On the contrary, there is some support for the proposition that a processed foodstuff which has been produced in a third country and is placed on the market in the European Union in accordance with the conditions laid down in Article 45(1) of Regulation (EU) 2018/848 may carry the EU organic production logo even though it contains, in addition to plant products, minerals and vitamins of non-plant origin and thus does not fulfil the requirements of Article 16(1) of Regulation (EU) 2018/848 in conjunction with Annex II, Part IV, point 2.2.2(f) thereto. On the one hand, it would also be compatible with the wording of Article 33(1) of Regulation (EU) 2018/848 to regard as ‘[the provisions of] this Regulation’ which have to be complied with not the provisions on production but, in the case of a product imported into the European Union, the provisions on importation, in particular on the recognition of production and control provisions as equivalent, contained in Article 45 et seq. of Regulation (EU) 2018/848. In that event, it would be sufficient for the purposes of compliance with the provisions referred to in the second sentence of Article 33(1) of Regulation (EU) 2018/848 for the product to

have been imported in accordance with the conditions laid down [in Article 45 et seq. of that regulation]. On the other hand, it would probably be more in line with the objective of breaking down barriers to trade that is pursued through the recognition of equivalence and other such arrangements, if a third-country product imported under the rules of equivalence could be labelled in the same way as the EU product that is its equivalent – but specifically not compliant with the same standards; the EU organic production logo is likely to be of considerable importance from the point of view of the competitiveness of the third-country product.

16 bb) If Question 1 is to be answered in the affirmative, might an inequality of treatment, in relation to the use of the EU organic production logo, of producers established in the European Union as compared with producers from third countries who are subject to production and control provisions recognised as equivalent, be present, if a product manufactured in the EU and a product manufactured in the third country were placed on the market in comparable circumstances, notwithstanding the different production and control provisions in the EU, on the one hand, and in the third country, on the other? Support for that proposition might be found in the fact that what matters here is not the production but the labelling of products that may be placed on the market in the EU and are in competition with each other. Any inequality of treatment present could, however, be justified. In this regard, the recognition of equivalence itself or the facilitation of trade thereby pursued could be cited as an objective ground for the unequal treatment. By contrast, the applicant takes the view that such a justification is inconceivable in any event in the case where – as here, in its view – the European Commission has recognised as equivalent production and control provisions which do not comply with 'essential' provisions applicable in the EU. In that event, it submits, the undertaking manufacturing in the EU is entitled to have to comply only with the production provisions applicable to the third-country undertaking. The question as to whether it thus follows from Article 20 of the Charter that the EU organic production logo may be used for a processed foodstuff where that foodstuff originates from the European Union and complies with the equivalent production and control provisions of a third country recognised in accordance with Article 48(1) of Regulation (EU) 2018/848 but does not meet the requirements of Article 16(1) of Regulation (EU) 2018/848 in conjunction with Annex II, Part IV, point 2.2.2(f) thereto, cannot be answered with sufficient certainty. The issue so addressed, which has to do with the practice of mutual recognition, may be of immense importance. It raises numerous questions of equality of treatment and reverse discrimination, as well as of the possible loss of regulatory autonomy on the part of the EU (see ECJ, Opinion of Advocate General Sharpston of 8 May 2014 – C-137/13 [ECLI:EU:C:2014:318] – point 59). Some clarification from the European Court of Justice is required in this regard.

17 cc) Irrespective of whether or not the applicant was authorised to use the EU organic production logo, a similar question arises in relation to the reference to

organic production, as provided for in Article 30(1) of Regulation (EU) 2018/848, which the contested decision also prohibited the applicant from using.

18 If two undertakings manufacture the same processed foodstuff, which complies with the equivalent production and control provisions of a third country recognised under Article 48(1) of Regulation (EU) 2018/848 but not – because, as here, of the addition of certain ingredients – the requirements of Article 16(1) of Regulation (EU) 2018/848 in conjunction with Annex II, Part IV, point 2.2.2(f) thereto, and wish to market their respective products in the European Union using the reference to organic production, there is, if the circumstances are in principle considered to be comparable, an inequality of treatment within the meaning of Article 20 of the Charter, inasmuch as, while, in accordance with the second sentence of Article 30(1) of Regulation (EU) 2018/848, the undertaking manufacturing in the EU may not include a reference to organic production in the marketing of its product in the European Union, the undertaking established in a country recognised under Article 48 of Regulation (EU) 2018/48 may include such a reference in the labelling of its product. This follows from that fact that, in accordance with Article 45(1)(b)(iii) of Regulation (EU) 2018/848, a product covered by that regulation may be imported from a third country for the purpose of being placed on the market within the European Union as an organic product if – in addition to meeting other conditions – it originates from a third country recognised under Article 48 of Regulation (EU) 2018/848 and complies with equivalent production and control provisions.

19 The questions set out in section (bb) with respect to the justification for an inequality in the treatment of producers established in the European Union and those established in third countries arise *mutatis mutandis* in connection with the reference [to organic production] provided for in Article 30 of Regulation (EU) 2018/848. It is unclear whether it follows from Article 20 of the Charter that the labelling of a processed food originating from the European Union may include a reference to organic production, within the meaning of Article 30(1) of Regulation (EU) 2018/848, without using the organic production logo of the European Union. The answer to those questions is not obvious in this scenario either.

20 4. The questions raised are relevant to the decision to be given. As the proceedings currently stand, this Chamber assumes that a product corresponding to the ‘Blutquick’ product could be manufactured and marketed as an organic foodstuff in the USA.

21 a) The USA is a third country recognised in accordance with Article 48(1) of Regulation (EU) 2018/848 in conjunction with Article 33(2) of Regulation 834/2007. Commission Implementing Regulation (EU) No 126/2012 of 14 February 2012 amending Regulation (EC) No 889/2008 as regards documentary evidence and amending Regulation (EC) No 1235/2008 as regards the arrangements for imports of organic products from the United States of America (OJ [2008] L 41, p. 5) included the USA in the list of third countries whose production systems and control measures for the production of agricultural

products were recognised as equivalent to those of Regulation (EU) No 834/2007, contained in Annex III to Commission Regulation (EU) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries. That inclusion was based on an equivalence arrangement concluded by an exchange of letters of 15 February 2012. Commission Implementing Regulation (EU) 2015/931 of 17 June 2015 amending and correcting Regulation (EC) No 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) 834/2007 as regards the arrangements for imports of organic products from third countries (OJ [2007] L 151, p. 1) extended for an indefinite period what had initially been a temporary inclusion. In accordance with the second sentence of Article 48(1) of Regulation (EU) 2018/848, that recognition is to expire on 31 December 202[5]. Council Decision (EU) 2021/1345 of 28 June 2021 authorising the opening of negotiations with a view to concluding agreements on trade in organic products (OJ [2021] L 306, p. 2) authorised the Commission to open such negotiations with, inter alia, the United States.

22 b) The appeal court held, in a manner binding on the court hearing the appeal on a point of law (Paragraph 137(2) and the first sentence of Paragraph 173 of the VwGO (Rules of Procedure of the Administrative Court), in conjunction with Paragraph 560 of the ZPO (Code of Civil Procedure)) that, in accordance with the relevant law of the USA (in particular the 'Organic Foods Production Act (OFPA)'), nutrient vitamins and minerals are allowed under certain conditions as ingredients in or on processed products labelled as 'organic' or 'made with organic (specified ingredients or food group(s))' (§ 206.605 of the OFPA). The parties expressed the view at the hearing that, as things stand, a product corresponding to the applicant's product would probably be marketed as 'organic' in the USA.

[…]

[Signatures]